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Ng Kah Leng (P) v Lai Chuan Shenq (L)

B HIGH COURT (SHAH ALAM) — DIVORCE PETITION NO 33–64–01 OF 2015
HAYATUL AKMAL JC
11 NOVEMBER 2017

C *Family Law — Divorce — Maintenance — Claim for shortfall of maintenance — Whether petitioner wife entitled to shortfall of interim order for maintenance — Whether ought to be awarded clean break — Whether maintenance order ought to be varied*

D *Family Law — Divorce — Matrimonial property — Claim for property that petitioner wife was living at — Whether petitioner wife entitled to property — Whether gifted by husband to petitioner wife during course of marriage*

E The petitioner and the respondent were married in 2012 and resided at their matrimonial home in Sri Petaling ('Sri Petaling house'). In 2015, an interim order was granted and the respondent had to pay the petitioner RM4,000 monthly as maintenance until the disposal of this petition. The respondent failed to comply with the terms of the interim order, causing the petitioner to
F take out a committal proceeding against the respondent. The parties then entered into a consent order for the outstanding maintenance. The respondent was ordered to pay a reduced amount of RM2,500 per month. According to the petitioner, before marrying the respondent, she was a senior air stewardess earning RM6,000 a month while the respondent was based in Bangkok. The
G respondent would come back to stay at least every fortnight and will stay with the petitioner for two or three days at the Sri Petaling house before returning to Bangkok for work. Before they were married, the petitioner resigned and took up a managerial post in a Bangkok company with a monthly salary of RM3,500. After marrying the respondent, the petitioner resided at the Sri
H Petaling house, which was owned half-owned by the respondent and half-owned by the respondent's father. In 2014, the respondent bought a condominium ('the EkoCheras Condominium'). According to the petitioner, the respondent bought the EkoCheras Condominium because he loved her and in return of taking care of his son from his previous marriage. In the present
I appeal, the respondent argued; (a) whether the petitioner was entitled to the shortfall of the interim order for maintenance; (b) a clean break award of RM30,000 ought to be awarded to the petitioner; and (c) EkoCheras Condominium be transferred to the petitioner and that, from there, the petitioner will assume the liability or the property be sold by public auction and

after the settlement of the chargee bank and related expenses, the balance proceed shall be credited in favour of the petitioner.

Held, allowing petitioner's application:

(1) The working status was of the petitioner was never a consideration for the JC then. To exercise the judicial discretion to vary the terms of maintenance, as agreed by the parties in the interim order, it must be placed before the court, by the respondent, the required materials of probative value to show the required change in material circumstances that would necessitate variation, as required by law. However, there was none and in its absence, there no material upon which the court could exercise its discretion on. The petitioner was entitled to the shortfall of the interim order for maintenance that was ordered by the court on 7 May 2015 and the said order was rescinded as at the date of this order. The petitioner was only entitled to the shortfall as at the date of this order (see para 27).

(2) In giving the order of a lump sum payment as a clean break, the inconsistent conduct of the respondent as regards to his commitment in meeting his monthly maintenance payments were considered. The sum of RM30,000 would be a fair and reasonable sum in lieu of the minimum RM4,000 per month which the petitioner was currently getting. A lump sum would be appropriate as a clean break in this case (see para 28).

(3) The letter dated 7 October 2014 clearly indicated that the respondent bought the EkoCheras Condominium with the intention that it be a gift to the petitioner. By his act and words, the respondent led the petitioner to believe that she would have a share in the said EkoCheras Condominium and it would be unconscionable for the respondent to deny that fact (see para 30).

[Bahasa Malaysia summary

Pempetisyen dan responden telah berkahwin pada tahun 2012 dan tinggal di rumah kelamin mereka di Sri Petaling ('rumah Sri Petaling'). Pada tahun 2015, perintah interim telah diberi dan responden perlu membayar pempetisyen RM4,000 sebulan sebagai nafkah hingga pelupusan petisyen ini. Responden gagal mematuhi syarat-syarat perintah interim, menyebabkan pempetisyen memulakan prosiding pengkomitan terhadap responden. Pihak-pihak kemudian memasuki perintah persetujuan untuk nafkah tertunggak. Responden diperintahkan membayar sejumlah RM2,500 sebulan. Menurut pempetisyen, sebelum berkahwin dengan responden, dia adalah pramugari senior yang berpendapatan RM6,000 sebulan manakala responden berpangkalan di Bangkok. Responden akan kembali sekurang-kurangnya setiap dua minggu dan akan tinggal bersama pempetisyen selama dua atau tiga hari di rumah Sri Petaling sebelum kembali ke Bangkok untuk bekerja.

Sebelum mereka berkahwin, pemohon meletak jawatan dan memegang jawatan pengurusan di sebuah syarikat Bangkok dengan gaji bulanan sebanyak RM3,500. Selepas berkahwin dengan responden, pemohon tinggal di rumah Sri Petaling yang dimiliki oleh responden dan separuhnya dimiliki oleh bapa responden. Pada tahun 2014, responden membeli sebuah kondominium ('Kondominium EkoCheras'). Menurut pempetisyen, responden membeli Kondominium EkoCheras kerana responden menyayanginya dan sebagai balasan menjaga anak responden hasil perkawinan sebelum ini. Dalam rayuan ini, responden menghujahkan: (a) sama ada pempetisyen berhak mendapat jumlah nafkah yang kurang dalam perintah interim; (b) award bersih sebanyak RM30,000 sepatutnya diberi kepada pempetisyen; dan (c) Kondominium EkoCheras dipindahkan ke pempetisyen dan selepas itu, pempetisyen akan mengambil alih liabiliti atau harta itu melalui jualan lelongan awam dan selepas penyelesaian bank pemegang gadaian dan perbelanjaan yang berkaitan, baki akan dikreditkan kepada pempetisyen.

Diputuskan, membenarkan permohonan pempetisyen:

(1) Status kerja pempetisyen tidak pernah menjadi pertimbangan bagi pesuruhjaya kehakiman. Untuk menjalankan budi bicara kehakiman untuk mengubah syarat-syarat penyelenggaraan, sebagaimana yang dipersetujui oleh pihak-pihak dalam perintah interim, harus dikemukakan di mahkamah, oleh responden, bahan-bahan yang perlu untuk menunjukkan perubahan yang diperlukan dalam keadaan material yang mewajarkan variasi, seperti yang dikehendaki oleh undang-undang. Walau bagaimanapun, ini tidak dilakukan dan dengan ketiadaannya, tidak ada material yang membolehkan mahkamah menjalankan budi bicaranya. Pempetisyen berhak mendapat jumlah kekurangan nafkah dalam perintah interim yang diperintahkan oleh mahkamah pada 7 Mei 2015 dan perintah tersebut telah dibatalkan pada tarikh perintah ini. Pempetisyen hanya berhak mendapat kekurangan tersebut pada tarikh perintah ini (lihat perenggan 27).

(2) Dalam memberi perintah bayaran sekaligus sebagai potongan bersih, tindakan responden yang tidak konsisten berkenaan dengan komitmennya dalam memenuhi pembayaran nafkah bulanannya dipertimbangkan. Jumlah RM30,000 akan menjadi jumlah yang saksama dan berpatutan sebagai ganti minimum RM4,000 sebulan yang mana pempetisyen kini peroleh. Jumlah sekali gus sesuai sebagai potongan bersih dalam kes ini (lihat perenggan 28).

(3) Surat bertarikh 7 Oktober 2014 dengan jelas menunjukkan bahawa responden membeli Kondominium EkoCheras dengan niat sebagai hadiah kepada pempetisyen. Dengan perbuatan dan kata-katanya, responden mendorong pempetisyen untuk mempercayai bahawa dia akan mempunyai bahagian dalam Kondominium EkoCheras tersebut

dan tidak boleh disangkal oleh responden untuk menafikan fakta ini (lihat perenggan 30).]

Notes

For a case on maintenance, see 7(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4327–4367.

For a case on matrimonial property, see 7(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4371–4373.

Cases referred to

Ananda Dharmalingam v Chantella Honeybee Sargon [2006] 6 MLJ 179, HC (refd)

C-Ampy Construction Sdn Bhd v Andalas Jaya Sdn Bhd [2014] 6 MLJ 599, CA (refd)

Ng Say Chuan (h) v Lim Szu Ling (w) and another application [2010] 4 MLJ 796; [2010] 10 CLJ 371, HC (refd)

Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor [1996] 1 MLJ 113, FC (refd)

Parkunan a/l Achulingam v Kalaiyarasy a/p Periasamy [2004] 6 MLJ 240; [2004] 7 CLJ 175, HC (refd)

Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee [2004] 3 MLJ 253, FC (refd)

Shilpa J Doshi v Jitendra Chhotalal Doshi [2004] 6 CLJ 113, HC (refd)

V Sandrasagaran Veerapan Raman v Dettarassar Velentine Souvina Marie [1999] 5 CLJ 474, HC (refd)

Wong Kim Foong (f) v Teau Ah Kau @ Chong Kwong Fatt [1998] 1 MLJ 359, HC (refd)

Yap Yen Piow v Hee Wee Eng [2017] 1 MLJ 17, CA (refd)

YCC @ JCC v LSY [2006] 7 MLJ 137; [2007] 7 CLJ 207, HC (refd)

Yeoh Ken Lee, Kelvin v Liew Chooi Hoong [2005] 5 CLJ 408, HC (refd)

Legislation referred to

Evidence Act 1950 ss 58, 58(1)

Law Reform (Marriage and Divorce Act) 1976 ss 53, 54(1)(b), 76, 76(2)(a), 77(1)(a), (1)(b), 83, 96, 97

Rabinder Singh (Rabin & Assoc) for the petitioner wife.
M Kalaichelvan (Abd Halim Ushah & Assoc) for the respondent husband.

Hayatul Akmal JC:

INTRODUCTION

[1] This is a single divorce petition ('encl 1') filed by the petitioner wife ('PW') against the respondent husband ('RH'), seeking an order for the

dissolution of PW's marriage to RH, monthly maintenance or lump sum/periodic payments and divisional of assets acquired during the marriage and cost.

[2] The PW claim from RH, for ease of reference which I reproduced (briefly) as follows:

(1) The said marriage be dissolved under s 54(1)(b) (read together with s 53 of the Law Reform (Marriage and Divorce) Act 1976);

(2) The respondent pay the petitioner a sum of monthly maintenance which the court deems appropriate, pending disposal of this petition pursuant s 77(1)(a) of the Law Reform (Marriage and Divorce) Act 1976;

(3) Pursuant to s 77(1)(b) of the Law Reform (Marriage and Divorce) Act 1976, the respondent makes lump sum payment, for a sum deemed appropriate by this court, to the petitioner as a clean break;

(4) Alternatively, pursuant to s 77(1)(b) of the Law Reform (Marriage and Divorce) Act 1976, the respondent make monthly periodic payments, for a sum deemed appropriate by this court, to the petitioner;

(5) Pursuant to s 76 of the Law Reform (Marriage and Divorce) Act 1976, the court order of the division of assets acquired by the parties during the marriage in such shares as this court considers fair, just and reasonable;

(6) Further or alternatively, pursuant to s 76 of the Law Reform (Marriage and Divorce Act) 1976, this court orders that any or more of the said assets as at paragraph five as aforesaid be sold, and less any redemption sum payable, if any, and the net proceed thereafter be divided among the parties in such manner as this court considers fair, just and reasonable; and

(7) Other ancillary and equitable reliefs and cost.

[3] RH in his reply denies the allegation by PW and pray that the divorce petition and other prayers by PW be dismissed, and party bear their own cost.

[4] This petition was partly heard by the previous learned judicial commissioner and when I took over the continued hearing on 16 August 2017, it was at the stage of the re-examination of RH. The list of witnesses called by the parties to this petition are as follows:

(a) PW ('PW1') had called two witnesses:

(i) Ng Kah Yin (('PW2') — PW's sister); and

(ii) Wei Kuh Geok (('PW3') — PW's mother);

(b) RH ('RW5') had called six other witnesses:

(i) Toontam Sukhosit (('RW1') — Director of Real M Co Ltd);

(ii) Tan Lan King (('RW6') — RH's mother); and

(iii) Dato' Foo Choo Yong (('RW7') — RH's employer).

subpoenaed witnesses:

(iv) Siti Rahimah bt Mohd Kosman (('RW2') — MAHB);

(v) Dura Ashikin bt Long Bidin (('RW3') — EPF); and

(vi) Dzulkarnaen bin Haseri (('RW4') — Maxis Officer).

[5] Parties agreed to adopt the notes of proceeding that were recorded earlier and I proceeded to hear and record the remaining evidence from the parties. Upon perusing all the evidence, relevant cause papers and the respective written submissions by the counsels, on 28 September 2017, I find that PW had succeeded in proving her case on balance of probabilities and the order from this court are as follows:

Prayer 16(1) due to the irretrievable breakdown of the marriage, I hereby order that the marriage is dissolved. Decree Nisi to be made absolute immediately.

Prayer 16(2) the petitioner wife is entitled to the shortfall of the interim order for maintenance as was ordered by this court on 7 May 2015 and that said order is rescinded as at the date of this order.

Prayer 16(3) I take note of the circumstances of the case and the duration of the marriage and therefore I order a clean break award of RM30,000 to the petitioner's wife.

Prayer 16(4) is disallowed.

Prayer 16(5) Properties:

(a) Regarding the Sri Petaling House, I hold that the petitioner wife is not entitled to claim.

(b) Regarding the EkoCheras Condominium, the said property be transferred to the petitioner wife and that from there on she will assume the liability on the said property or the property be sold by public auction and after the settlement of the chargee bank and other related expenses, the balance proceed shall be transferred to the PW.

Prayer 16(6) is disallowed and no order as to cost.

Dissatisfied with part of the above decision, RH is now appealing against prayer 16(2), prayer 16(3) and prayer 16(5)(ii). My reasons are as follows.

A BRIEF FACTS

[6] The counsel for PW affirmed (with no objection from the counsel for RH) that throughout the proceeding, parties agreed that:

B (a) that the marriage had irretrievably broken down and agreed to divorce;

(b) the evidence which led to the breakdown of the marriage ought not be led at the trial; and

(c) the remaining issues would be relating to maintenance and property C division.

Therefore, I will only confine the facts of this case to the above stated issues only.

D

[7] PW and RH were married on 4 September 2012 at the Kuil Buddha, Brickfields, Kuala Lumpur ('the said marriage') and resided at No 23, Jalan Perisa 13, Bandar Baru Sri Petaling, 57000 Kuala Lumpur ('the Sri Petaling house').

E

[8] On 7 May 2015, an interim order ('the said interim order') was granted whereby RH was ordered to pay PW an amount of RM4,000 monthly as maintenance until the disposal of this petition. RH however, failed to comply with the terms of the said interim order whereby PW took out a committal F proceeding against RH. Subsequently on the 5 August 2015 ('the consent order'), the parties agreed that RH is to pay RM10,000 for the outstanding maintenance arising from the said interim order from May 2015 until August 2015 and thereafter allowed to pay a reduce amount of RM2,500 per month pending the determination of the divorce petition before this court with PW G given the right to claim the shortfall (RM1,500) in the maintenance (as ordered in the said interim order) at the disposal of the said divorce petition.

[9] According to PW, before marrying RH, she was a senior air stewardess with Malaysia Airline ('MAS') earning about RM6,000 a month while RH H works for a company in Bangkok known as Prinsiptek Thai Ltd as a manager in property development. According to PW, RH will come back to Malaysia at least every fortnight and will stay with PW for 2–3 days at the Sri Petaling house before returning to Bangkok for work. According to PW, RH was a divorcee and has a son by the name of Lai Guan Hong ('LGH') being cared for I by RH parents at the Sri Petaling house. Before they were married, RH persuaded PW to resign and offered PW the post of manager of sales and marketing in a company called Real M Co Ltd Bangkok with a monthly salary of RM3,500. RH was running that company ('Real M Co Ltd Bangkok'). PW then elected to opt for the voluntary separation scheme ('VSS') before

marrying RH after which they resided at the said Sri Petaling house as their matrimonial home where RH owned half share and his father owned the other half share. On or about February 2014, RH bought a condominium in EkoCheras ('the EkoCheras Condominium') for about RM450,000 where RH paid the 10% deposit (refer p 21–49, common bundles). According to PW, RH told her that he is buying the EkoCheras Condominium for her because he loves her and PW in return took care of LGH. It is the contention of PW that after some disagreement with RH, he allegedly abused her resulting in her leaving the said Sri Petaling house on 22 April 2014 and returned to live with her mother in Klang. PW2 is PW's sister who is also an authorised insurance agent who had prepared PW's policy content analysis (p 224, Common Bundles). PW3 is PW's mother who confirmed that PW is staying with her in a rented house and it was PW who paid the rental of RM650 a month.

[10] RW1 is the Director of Real M Co Ltd and confirmed that the PW had worked as manager in the sales and marketing department with a monthly salary of Thai Baht 35,0000 (approx RM3,500) from July 2012–February 2013 when PW took a six months leave and returned to Malaysia. Even though PW didn't come back to work at Real M Co Ltd (as promised by PW), nevertheless RW1 continued to pay PW's salary until November 2013. RW3 is a senior executive with Malaysia Airport Holdings Bhd ('MAHB') who during cross-examination confirmed that beside the letter dated 27 May 2015 ('ID21') she has no other document to show that PW was working with Malaysia Airlines ('MAS'). RW3 is a *Pengurus Caruman* EPF who confirmed that PW's EPF was paid from September 2014 until March 2017. RW4 is an officer from Maxis. RH in his evidence, contended that PW was all the while gainfully employed and consequently, she doesn't need any maintenance from him and pray that PW return all the money paid pursuant to the said consent order. RW6 is RH's mother who confirmed that she is the one taking care of LGH and the Sri Petaling house without any assistance from PW. RW7 is the Managing Director of Pinsiptek Corp Bhd who confirmed that RH's salary is Thai Baht 142,270 (approx RM14,227) and the company is also responsible to pay all of RH personal income tax and other relevant deductions in Thailand which is about Thai Baht 30,150 (approx RM3,015) per month.

THE APPEAL

[11] RH appeal are as follows:

(a) whether the PW petitioner wife is entitled to the shortfall of the interim order for maintenance dated 7 May 2015;

(b) clean break award of RM30,000 awarded to the PW; and

(c) EkoCheras Condominium be transferred to the PW and that from there on the PW will assume the liability or the property be sold by public

auction and after the settlement of the chargee bank and related expenses, the balance proceed shall be credited in favour of PW.

SUBMISSION BY THE PETITIONER WIFE ('PW')

[12] PW submitted that under the consent order recorded on 5 August 2015, the amount of maintenance payable by RH was RM4,000 per month. There was no variation of the said interim order except that the method of payment was reformulated, ie, RH was allowed to pay RM2,500 on or before 7 of every month with PW reserving her right to claim the shortfall at the determination of this petition. RH had in fact appealed to the Court of Appeal as regards to the said interim order granted by the previous learned judicial commissioner on 7 May 2015, but however he had withdrawn the said appeal and therefore the terms of the said interim order remains and the grounds of judgment of the learned judicial commissioner stands. Notwithstanding the contention by RH that PW had misled the court in obtaining the said interim maintenance order, he nevertheless admitted in evidence that he had agreed to the said interim order voluntarily and had also withdrew the appeal voluntarily upon advice of the current solicitors.

[13] Consequently therefore, since the said interim order and the grounds of judgment of the learned judicial commissioner stands unchallenged, RH is estopped (by election) from challenging the findings of fact and law and the assessment of quantum of maintenance of RM 4,000 per month by the said learned judicial commissioner, even though PW's EPF statements for the years 2014, 2015, 2016 and 2017 indicated that the PW had been gainfully employed during that period. Since RH did not make any other application to vary the said interim order dated 7 May 2015, it remains valid until it is set aside subject to only the consent order dated 5 August 2015 which reformulated the payment method and amount with no change in quantum.

[14] In the event this court is minded in granting a lump sum to facilitate a clean break, considering the inconsistent conduct of RH in meeting his payment obligations on maintenance as ordered, a reasonable sum in lieu of the minimum RM4,000 per month which the PW is currently getting would be appropriate as a clean break award in the circumstances of the case. It is further argued that in the alternative if the court is not minded in granting a clean break then the status quo of RM4,000 per month of maintenance ought to be maintained in favour of the PW for a total sum of RM384,000 ((RM4,000 per month x 12 = RM48,000 per year) / (RM48,000 per year x 8 years = RM384,000)).

[15] Learned counsel referred to the letter from the PW's solicitors to RH dated 7 October 2014 (at p 55 Bundle B), which is marked as *Bahagian* A

ikatan dokumen-dokumen bersama, it reads:

> On or about February 2014, you bought an apartment in EkoCheras. At the time of the purchase, you told our client that out of love and affection for her as a wife, you were buying it for her but as your income was substantial, it would be easier for you to get a loan and as such, the said property was purchased in your name, for about RM450,000. The said apartment is scheduled for completion in December 2018.

Therefore, it is an agreed fact that when RH bought the Condominium, he had intended it to be a gift to PW. In *C-Ampy Construction Sdn Bhd v Andalas Jaya Sdn Bhd* [2014] 6 MLJ 599 the Court of Appeal held:

> [24] With regard to the respondent's solicitors letter of 30 March 2009, in our judgment if was not merely an agreement to put a document into an agreed bundle of document. In our view the request to put the arbitrators final award in the agreed and admitted part of the common bundle was a conscious effort made by the solicitors since it suited the appellants purpose, in that, it has been held that once a document is found in the agreed and accept part of the bundle of documents, not only is formal proof of the making of the documents not required, the truth of the contents of the document is agreed to ...

It was argued that admitted facts need not be proven as provided under s 58(1) of the Evidence Act 1950 which provides that no fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing or which before the hearing they agree to admit by any writing under their hands or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings.

[16] Learned counsel referred to RH's affidavit dated 26 March 2015 affirmed during the interim maintenance proceedings which clearly indicated that PW is to have a share in the said EkoCheras Condominium unit and in the circumstances of the case it would now be unconscionable for the RH to deny PW from getting her share. It was further argued that it would be in error to allow RH to use s 76(2)(a) of the Law Reform (Marriage and Divorce) Act 1976 to exonerate himself from the obligation that he himself created. I was alluded to *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor* [1996] 1 MLJ 113, where the Federal Court held:

> The equitable jurisdiction by which a personal bar is placed upon a litigant from raising or relying upon the provisions of a statute is also contained in the maxim 'equity will not permit statute to be used as an engine of fraud'.

SUBMISSION BY THE RESPONDENT HUSBAND ('RH')

[17] Learned counsel for RH argued, by relying on s 83 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act'), this court has the jurisdiction to vary/rescind the said interim order dated 7 May 2015 and the consent order dated 5 August 2015, respectively. RH had tendered evidence that currently he earns only about RM14,227 or Thai Baht 142,270 (salary slip pp 26–28 of Bundle E) and this fact was confirmed by RW7 ('the employer'). Learned counsel for RH argued that PW's case on maintenance rested purely on reliance on general principles of law on maintenance and materials presented during the hearing for PW's application for interim maintenance pending the disposal of this divorce petition were only in that regard. The issue that the aggrieved marriage was a short childless marriage was never addressed. The childless marriage in the present case having lasted for only one year and seven months and the PW being a young and able-bodied person, have returned to her employment with Malaysian Airlines Bhd commencing from 1 September 2015. It is therefore the argument of learned counsel for RH that the issue of maintenance is wholly irrelevant in the circumstances and ought to be disregarded. It is RH's further argument that PW's argument is anchored primarily on the said interim order dated 7 May 2015 which was subsequently varied by the consent order dated 5 August 2015. It was argued that the documents produced during the application for interim maintenance must be admitted in court as the court in granting the interim maintenance order, took into consideration all the documents as evidence in court. It should be pointed out that PW's application for interim maintenance was pursuant to s 77(1)(a) of the Act and the hearing was merely by way of affidavit evidence. Therefore, it is trite that those said documents must be produced at the trial stage by PW and be subject to examination process at the trial. It was argued therefore that, full and frank disclosure must be made at the trial stage with regards to the documents produced at the interim proceedings before any adverse inference can be drawn against either party. To support the above, RH refers to the case of *Ananda Dharmalingam v Chantella Honeybee Sargon* [2006] 6 MLJ 179, where Faiza Thamby Chik J in dismissing the respondent's wife claims held:

> [8] There must be in the first place the process by which demands were made, documents exchanged and cross-examination had taken place before any adverse inference (lack of full and frank disclosure) can be drawn against the said party with respect to such means ...

[18] RH further argued that the doctrine of estoppel by election as raised by PW in her submission is irrelevant and is not applicable to the present case as the interim maintenance order was made pursuant to s 77(1)(a) of the Act, which is subject to variation upon a full trial of the divorce petition. Section 83 of the Act clearly allows the court at any time and from time to time to vary, or rescind, any subsisting order for maintenance, where it is satisfied that the order

was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances (for RH to prove). It is the argument of RH that PW had mislead this court by interpreting the wording in the said consent order to mean that regardless of the decision of this court on the divorce petition, PW is entitled to claim for the shortfall amounting to RM1,500 per month. However, it must be observed that the intention of the parties when the consent order was recorded in court, the parties compromised and agreed that RH is to pay RM10,000 for the outstanding maintenance arising from the said interim order from May 2015 until August 2015 and thereafter allowed to pay a reduce amount of RM2,500 per month pending the determination of the divorce petition before this court with PW expressly given the right to claim the shortfall (RM1,500) in the maintenance as ordered in the interim order at the disposal of the divorce petition. There was in effect no variation of the quantum agreed to and so ordered by the court. It is given that the terms of the consent order would simply mean that the PW's right to claim for the balance of the interim maintenance is subject to any findings, decision and exercise of judicial discretions on the divorce petition proper, arrived at by this court.

[19] This is a case of a short childless marriage where the marriage lasted for only one year and seven months and in considering the issue of maintenance, the court ought to consider the 'clean break' principle which is normally adopted by the family court in a short childless marriage. In *V Sandrasagaran Veerapan Raman v Dettarassar Velentine Souvina Marie* [1999] 5 CLJ 474, Faiza Tamby Chik J in dismissing the respondent's claim for monthly maintenance had decided as follows:

> [3] A long delay in claiming maintenance by the wife in cases of short marriage were factors that were considered by the courts along with other factors. In this instance, the respondent received no financial support from the petitioner and she did not make any attempt to claim for maintenance. She filed a claim for maintenance almost seven years after marriage and that too after the petitioner had commenced divorce proceedings.
>
> [4] It was a policy and trend of the courts that on the breakdown of a marriage, if possible, a clean break financially should be achieved. Where there is a short marriage which 'lacked any permanence', the approach of the courts in achieving a 'clean break' is by awarding a small lump sum to enable the party in a weaker financial situation to adjust herself to her financial situation.
>
> [5] In deciding whether the respondent was entitled to financial relief from the petitioner, the court should take into consideration the means and needs of the parties. In assessing the means and needs of the parties, the court should have regard to the duration of the marriage, whether there were any children to the marriage, the age of the parties, whether the petitioner had financially supported the respondent during the duration of their marriage, the parties earning capabilities and whether the divorce would had affected her position financially.

[20] RH further argued that, PW is not entitled to the said EkoCheras Condominium because it was bought on 5 May 2014 after PW had left the family home on 20 April 2014 and PW did not contribute to the purchase of the said EkoCheras Condominium. It was after PW left the matrimonial home in Sri Petaling on 20 April 2014, that RH entered into a sale purchase agreement for an agreed purchase price of RM503,516. It was purchased and registered under the RH's sole name and he has paid the 10% deposit and other related expenses. He had also obtained a 90% loan to finance the said purchase. The said EkoCheras Condominium unit is still under construction and vacant possession has not been delivered. It is the contention of RH that PW had not made any kind of contribution (financial or otherwise) in the said purchase which was admitted by PW during cross-examination during the trial of this action. In *Shilpa J Doshi v Jitendra Chhotalal Doshi* [2004] 6 CLJ 113, where Faiza Tamby Chik J said:

> [4] The petitioner's claim that she cared for the family, the children and the matrimonial home was refuted by the respondent that there were maids throughout the marriage and that the petitioner was busy doing business and conducting yoga classes. The petitioner had failed to provide a single receipt for any monies spent towards the family. Therefore, s 114(g) of the Evidence Act 1950 applied to invoke an adverse inference on the petitioner's failure to produce proof of her contribution.
>
> [5] The petitioner failed to specify the contribution she made towards the acquisition of the properties she referred to as matrimonial properties ('the said properties'). The said properties, although placed in the respondent's name, were not purchased by the respondent or the petitioner but by the respondent's late father. The respondent and the petitioner did not contribute to the said properties. Further, the will and the memorandum of understanding of the respondent's father clearly showed that it was never his intention that the petitioner or the children to enjoy his assets.

THE LAW

[21] Sections 76, 83, 96 and 97 of the Law Reform (Marriage and Divorce) Act 1976 provides as follows:

> 76 Power for court to order division of matrimonial assets
>
> (1) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or the sale of any such assets and the division between the parties of the proceeds of sale.
>
> (2) In exercising the power conferred by subsection (1) the court shall have regard to:
>
> (a) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;

(b) any debts owing by either party which were contracted for their joint benefit;

(c) the needs of the minor children, if any, of the marriage, and subject to those considerations, the court shall incline towards equality of division.

(3) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired during the marriage by the sole effort of one party to the marriage or the sale of any such assets and the division between the parties of the proceeds of sale.

(4) In exercising the power conferred by subsection (3) the court shall have regard to —

(a) the extent of the contributions made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring the family;

(b) the needs of the minor children, if any, of the marriage, and subject to those considerations, the court may divide the assets or the proceeds of sale in such proportions as the court thinks reasonable; but in any case, the party by whose effort the assets were acquired shall receive a greater proportion.

(5) For the purposes of this section, references to assets acquired during a marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts.

This section relates to the power of the court to order division of matrimonial assets acquired during the marriage by the joint effort of parties upon granting a decree of divorce or judicial separation.

[22] Sections 83, 96 and 97 of the Act provides instances where the orders from the court can be varied, as follows:

(a) s 83 provides as follows:

83 Power for court to vary orders for maintenance

The court may at any time and from time to time vary, or rescind, any subsisting order for maintenance, whether secured or unsecured, on the application of the person in whose favour or of the person against whom the order was made, or, in respect of secured maintenance, of the legal personal representatives of the latter, where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances.

(b) s 96 provides as follows:

> 96 The court may at any time and from time to time vary, or may rescind, any order for the custody or maintenance of a child on the application of any interested person, where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances.

(c) s 97 provides as follows:

> 97 The court may at any time and from time to time vary the terms of any agreement relating to the custody or maintenance of a child, whether made before or after the appointed date, notwithstanding any provision to the contrary in any such agreement, where it is satisfied that it is reasonable and for the welfare of the child so to do.

FINDINGS OF THIS COURT

Whether the PW is entitled to the shortfall of the interim order for maintenance dated 7 May 2015

[23] I refer to the said interim order dated 7 May 2015 and the said consent order dated 5 August 2015. I agree with the submission of learned counsel for PW, the interim order where RH was to pay PW an amount of RM4,000 per month was duly ventilated before the previous learned judicial commissioner. Notwithstanding the interim nature of the said order it remains valid and legally effectual unless and until it is stayed, varied or revoked. It is undeniable that the said interim order was never in fact challenged by RH. The appeal that was lodged with the Court of Appeal was subsequently withdrawn leaving the said interim order and the findings in the grounds of the learned judicial commissioner in respect of the said order intact. By withdrawing his legal challenge to the said interim order would tantamount to a tacit acceptance of the said interim order and giving it, finality subject to and pending the determination of the divorce petition. It is unrefuted that RH had expressly consented to the terms of the said interim order and similarly had voluntarily withdrawn the appeal to challenge the said interim order. By expressly consenting to the said terms of the consent order, RH subsequent points of objection to contest maintenance using the same materials cannot hold as he had tacitly waived his right to raise the matter further for deliberation. The law is trite that when parties elected to abandon issues before the court, the court will disallow the same materials to be raised in subsequent proceedings (see *Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee* [2004] 3 MLJ 253). There was no further effort by RH to vary the said interim order save for the variation on the payment as contained in the said consent order. And it uncontroverted that the quantum of maintenance in the said interim order was never at any material time varied by the court. I wish to reiterate that when the consent order was recorded in court on 5 May 2015, the parties compromised and agreed that RH is to pay RM10,000 for the outstanding maintenance arising

from the said interim order from May 2015 until August 2015 and thereafter allowed to pay a reduce amount of RM2,500 per month pending the determination of the divorce petition before this court with PW expressly reserving the right to claim the shortfall (RM1,500) at the determination of the said divorce petition. There was in effect no variation of the quantum agreed to and so ordered by the court. The right to claim for the shortfall is as contained in the said consent order and it would be unjust to say otherwise at this juncture.

[24] As I had said earlier that it is given that the court has the judicial discretion pursuant to s 83 of the Act to vary/rescind the interim maintenance order dated 7 May 2015 and the consent order dated 5 August 2015 respectively at the determination of this divorce petition. The unchallenged interim order has only the characteristics of definiteness subject to the Act, findings and order of this court. In *Yeoh Ken Lee, Kelvin v Liew Chooi Hoong* [2005] 5 CLJ 408, where it was held:

> [1] That there was no question of ether party being estopped from varying an order made by consent, if the application to vary was made under either ss 83 or 96 of the Law Reform (Marriage and Divorce) Act 1976, as the law gives the court the power to vary such orders in the circumstances set out in those sections, and the power is not limited to non-consensual.

[25] Section 83 of the Act clearly allows for the court at any time and from time to time to vary, or rescind, any subsisting order for maintenance, where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances. In that light and in the circumstances of the case the court must interpret the said consent order in its ordinary and natural meaning.

[26] It is to be noted that, in the case of a consent order, there are plethora of cases that holds a consent order must rarely be disturbed unless there are exceptional circumstances that warrants the intervention of the court and the burden is on the applicant to prove on balance of probabilities that the need to vary legally existed. In the case of *Ng Say Chuan (h) v Lim Szu Ling (w) and another application* [2010] 4 MLJ 796; [2010] 10 CLJ 371 where Yeoh Wee Siam J held:

> [1] A consent order must rarely be disturbed unless there are exceptional circumstances that warrant the intervention of the court. Under s 96 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act'), the court has the discretionary power to vary the interim order for custody or maintenance of the children if there is any material change in the circumstances.

[27] In *YCC @ JCC v LSY* [2006] 7 MLJ 137; [2007] 7 CLJ 207, Clement Skinner J stated the husband carries the carries the evidential burden of

satisfying the court, on a balance of probabilities, that there is a material change of circumstances. In the present case before the court today, it is my considered view that the said interim order and the said consent order was considered in depth by the previous learned judicial commissioner (refer Bundles of Documents D, pp 386–396), and nowhere in her grounds of judgment she had considered the working status of PW. What the learned judicial commissioner had stated at paras 16 and 17 of her judgment was that PW needed the said maintenance to continue with her life and the amount RM4,000 was awarded based on the salary of RH and by referring to *Parkunan a/l Achulingam v Kalaiyarasy a/p Periasamy* [2004] 6 MLJ 240; [2004] 7 CLJ 175, where it was held in determining the amount of maintenance, the court should take into consideration the means and needs of the parties. It is my considered view that the working status of PW was never a consideration for the learned judicial commissioner then. For me to exercise my judicial discretion to vary the terms of maintenance as agreed by the parties in the said interim order, it must be place before me by RH the required materials of probative value to show the required change in material circumstances that would as a matter of course necessitates variation as required by law. Unfortunately, there is none and in its absence, there is no material upon which I can exercise my discretion on. I would like to quote from Abdul Malik J in *Wong Kim Foong (F) v Teau Ah Kau @ Chong Kwong Fatt* [1998] 1 MLJ 359 that: 'The fact that the wife is gainfully employed and has her own income does not disentitle her to maintenance from the husband ...The fact that no maintenance payment is made to her during the marriage does not ipso facto excuse the husband's obligation to provide for maintenance for the wife subsequently'. Consequently therefore, I have made the order that PW is entitled to the shortfall of the interim order for maintenance that was ordered by this court on 7 May 2015 and I further ordered that said order is rescinded as at the date of this order. I hold in the circumstances of the case, PW is only entitled to the shortfall as at the date of this order.

Clean break award of RM30,000 awarded to the PW

[28] In giving the order of a lump sum payment as a clean break, I considered the inconsistent conduct of RH as regards to his commitment in meeting his monthly maintenance payments. I hold that the above sum would be a fair and reasonable sum in lieu of the minimum RM4,000 per month which PW is currently getting. To my mind a lump sum would be appropriate as a clean break in this case.

[29] I take cognisance of the fact that this is short childless marriage that lasted for only one year and seven months and in considering the issue of maintenance, this court ought to look into the 'clean break' principle which is normally adopted by the family court in a short childless marriage (refer *V Sandrasagaran Veerapan Raman*). In the present case, there was no delay, the

divorce petition was filed on 15 January 2015 and PW had on 16 February 2015 filed the application for interim maintenance as provided for under s 77(1)(a) of the Act ('encl 4'). And clearly from the facts of this case, PW did receive financial support from RH and after filling the divorce petition, PW had immediately filed an application by invoking the provision under s 77(1)(a) of the Act for interim maintenance.

EkoCheras Condominium be transferred to the PW and thereafter PW will assume the liability on the said property or the property be sold by public auction and after the settlement of the chargee bank and other related expenses, the balance proceed shall be credited in favour of PW

[30] Whether the said EkoCheras Condominium is caught as a matrimonial asset can be determined by looking at *Yap Yen Piow v Hee Wee Eng* [2017] 1 MLJ 17, where the Court of Appeal held that:

> [11] Section 76 of the LRA 1976 is the key statutory provision to deal with the division of the property. In principle, it differentiates assets acquired during the subsistence of marriage into three types. They are as follows:
>
> (a) any assets acquired by joint efforts which we have classified as matrimonial property. In this category, the court has an obligation to divide the assets (see s 76(1) of the LRA 1976);
>
> (b) any assets acquired by one party by sole effort which we classify as non-matrimonial property. In this category, the court is not obliged to divide but may do so (see s 76(3) of the LRA 1976); and
>
> (c) assets which were acquired before the marriage, but has been substantially improved by the other party or by their joint efforts. In this category, if there is no substantial improvement, the property is not subjected to division at all. In addition, if the property has been acquired before the marriage and subjected to a loan, the said property may not fall in that category (see s 76(5) of the LRA 1976).

Notwithstanding the fact that PW had acknowledged that RH bought the said EkoCheras Condominium and registered it under his name when she left the matrimonial home in Sri Petaling, I am of the considered view in the circumstances of the case, the letter dated 7 October 2014 (refer para 15 above), clearly indicated that RH bought the EkoCheras Condominium with the intention that it be a gift to PW.

[31] I was alluded to *C-Ampy Construction Sdn Bhd v Andalas Jaya Sdn Bhd* [2014] 6 MLJ 599, where it was clearly said by the Court of Appeal that documents adduced in court that's included in the agreed and accepted part of the bundle of document not only does not require further formal proof of those documents, but the contents thereof is agreed to. Therefore, it is trite that the law is clear that an admitted fact need not be proven as provided under s 58(1)

of the Evidence Act 1950. It provides that no fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing or which before the hearing they agree to admit by any writing under their hands or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings.

[32] I refer to the RH affidavit dated 26 March 2015 ('encl 14') affirmed by the RH during the interim maintenance proceedings (pp 143–144, Bundle D), where the RH had expressly admitted the following:

> 23 Selain daripada pada atau sekitar Februari 2014, saya telah membeli Apartmen Cheras dan bagi memudahkan pinjaman daripada bank, saya telah meletak nama saya sendiri atas Apartmen Cheras ...
>
> (d) Apartmen Cheras merupakan rumah perkahwinan saya dan Pempetisyen; dan
>
> (e) Sememangnya saya mempunyai niat untuk memindahmilik Apartmen Cheras kepada Pempetisyen selepas saya habis membayar pinjaman bank asalkan Pempetisyen adalah isteri saya tetapi Pempetisyen asyik tegas bahawa saya seharusnya menamakannya sebagai pemilik tunggal dari awal-awal lagi semasa saya membeli Apartmen Cheras.

[33] I find that by his act and words, RH had led PW to believe that she would have a share in the said EkoCheras Condominium unit and it would now be unconscionable for RH to deny that fact. It is trite that a statute cannot be allowed to be used as an engine of fraud and to allow RH to uses s 76(2)(a) of the Act to facilitate such a design would be unjust. In *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor* [1996] 1 MLJ 113 Federal Court held that the equitable jurisdiction by which a personal bar is placed upon a litigant from raising or relying upon the provisions of a statute is also contained in the maxim, 'equity will not permit statute to be used as an engine of fraud'.

[34] As contended by RH, it cannot be denied that the said EkoCheras Condominium unit was purchased after PW had left the family home in Sri Petaling. PW had not made any kind of contribution (financial or otherwise) in the said purchase and therefore PW ought not to have any interest or share in the said condominium unit. In *Shilpa J Doshi*, Tamby Chik J succinctly puts it that the petitioner must prove her contribution in the acquisition of the said properties. That notwithstanding, the circumstances of the case clearly showed, and materials presented irrefutably indicated that the said EkoCheras Condominium was acquired by RH as a gift for PW during their marriage. In my considered view, though the official and formal acquisition took place after she left the family home, it does not alter the intended nature of the acquisition by RH as gift to PW when they were together. Since the said EkoCheras Condominium unit is still at the early stage of development, therefore it is fair that the said property be transferred to PW forthwith from the date of this order and from there on she will assume all the liability on the said property or

the property be sold by public auction and after the settlement of the chargee bank and other related expenses, the balance proceed shall be credited to the account of PW.

CONCLUSION

[35] Considering the foregoing and after closely scrutinising the application and examining all evidence adduced before me, I allowed PW's application (L1) and with no order as to cost.

Allowed petitioner's application.

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